No. 12,593

IN THE

United States Court of Appeals

For the Ninth Circuit

NELDA SHANAHAN,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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I.

PREJUDICIAL ERROR IN INSTRUCTIONS TO THE JURY REGARDING PRESUMPTION OF ORDINARY CARE.

Appellant reiterates that the insufficiency of the evidence is not an issue except as it may apply to prejudicial errors committed by the Court, particularly as to the reversible error in ruling out the statutory presumption of ordinary care and lawful conduct which clothed appellant's decedent when appellee's train killed him. The Court instructed the jury that the presumption could "not stand in the case of testimony which overcomes it" and that

"it passes out of the case" since "it exists only in the absence of proof of the facts" and "what the person *injured* actually did" which, when proved, required the jury to determine the question of negligence "without regard for any presumption that care was exercised" as "there is no room for any presumption" (R. 542-543).

The law is clear that this is reversible error. This presumption does not pass out of the case just because just any testimony given in the case tends to overcome it. The law requires that in order to overcome the presumption, the record has to show testimony on the part of appellant's own witnesses wholly irreconcilable with the presumption. This the record completely fails to show.

In addition to the cases already cited in appellant's opening brief supporting this point, there are:

Engstrom v. Auburn Auto Sales Corp., 11 Cal. (2d) 64, 70, 77 Pac. (2d) 1059, 1063;

Chakmakjian v. Lowe, 33 Cal. (2d) 308, 313, 201 Pac. (2d) 801, 803;

Whicker v. Crescent Auto Co., 20 Cal. App. (2d) 240, 243, 66 Pac. (2d) 749, 751;

Roberts v. Salmon, 66 Cal. App. (2d) 22, 27, 151 Pac. (2d) 556, 559;

Duvall v. T.W.A., 98 A.C.A. 115, 119, 219 Pac. (2d) 463, 467.

Although there is some authority taking a contrary position, it is an indefensible position unsupported by reason. Where a showing is made by plaintiff's

witnesses in a death case wholly reconcilable with the presumption, the presumption remains in the case and must be weighed by the jury. There is no possible justification for the instruction to the jury that the presumption passed out of the case. The presumption could not pass from the case or be ignored by the jury without prejudicial error resulting in consequent injustice to appellant for whose protection and benefit the presumption exists.

Appellee has cited some cases which, divorced from the facts, appear to hold that what the Court did here, although error, is not prejudicial error. However, in a death case of similar facts, the California Courts hold not that a proper instruction on the presumption may be given, but that it must be given.

Kelley v. City and County of San Francisco, 58 Cal. App. (2d) 872, 876, 137 Pac. (2d) 719, 721;

Jackson v. Utica Light & Power Co., 64 Cal. App. (2d) 885, 895, 149 Pac. (2d) 748, 752;

Paulsen v. Spencer, 78 Cal. App. (2d) 268, 271, 177 Pac. (2d) 597, 598;

McKinley v. Southern Pac. Co., 80 Cal. App. (2d) 301, 309-313, 181 Pac. (2d) 899, 905-907.

It may be readily seen from the foregoing that it is improper as well as unnecessary to this Specification of Error to review, as appellee has done, the conflicting testimony of all appellee's witnesses. It is only proper and necessary to review the evi-

dence produced on behalf of appellant as designated (R. 575). The record shows that this evidence is wholly reconcilable with the presumption (A.O.B. 2-8, 20-38). In view of the state of the record, the presumption couldn't have passed out of the case though the Court erroneously instructed the jury otherwise to appellant's prejudice (R. 542-543).

On this point, appellee admits error by stating, "The cases cited by appellant hold further that it is for the jury's determination whether or not that presumption has been overcome" (A.B. 47). That is exactly what appellant is contending, but that is not the Court's instruction to the jury. Consequently, the jury couldn't have considered it in its deliberations.

Contrary to appellee's assertion, the presumption applies where the driver stops, looks and listens (*Scott v. Sheedy,* 39 Cal. App. (2d) 96, 102). Any cases cited by appellee on this point which are asserted to be to the contrary are easily distinguishable on their facts.

Appellee mistakenly asserts that since decedent "was not seen" to wipe the steam off the windshield and window to his right, "there can be no presumption that he took this precaution" (A.B., 8). Apart from the presumption of due care which applied to decedent, both Mr. Hewes and Mr. DeRosa, the only eyewitnesses to the incident, saw decedent wipe off the steam (R. 61, 78-79, 103, 118, 137) and Mr. DeRosa added that decedent "didn't seem to be in

any particular hurry to go ahead and proceed. He took quite a bit of care in wiping it off" (R. 119). As to the time taken in wiping, this occurred on cross-examination of Mr. DeRosa (R. 137):

"Q. Whatever the length of time that took?

A. A man as cautious as he was——

Mr. Phelps. Well, now, I will ask that go out and ask that the question be answered.

The Court. It will be stricken.

Mr. Phelps. Thank you, your Honor.

Q. Can you answer my question? I will reframe it. My question is: You say that it is a little difficult for you to judge time. I am trying to fix it for you another way and would you say——

A. It isn't difficult for me to judge time. I referred to distance.

Q. Oh, I see—after I believe. In any event, whatever that time takes to perform what he did, what you said, that is about the time he was stopped. Is that right?

A. I would say possible he stopped there a minute.

Q. All right.

A. *Or so.*

Q. And you came up right behind him as he stopped, did you?

A. Yes.

Q. Had him under observation the entire time from the time you first saw him at the point D-1 until he did come to a stop?

A. Yes." (Emphasis ours.)

Appellee's evidence conflicted with appellant's evidence on the fact question of warning by locomotive

whistling, bell ringing and the headlight beam, but this conflict existed solely between the evidence adduced by appellant's witnesses on the one hand, and that of appellee's witnesses on the other. This had no effect on the presumption of due care being applicable. There was no conflict within appellant's evidence. Her witnesses testified that no such warnings were given until too late and just an instant before the crash occurred (R. 62-65, 80-81, 101, 121-123, 138-142, 144-145, 154-157).

Appellee asks "just why Shanahan ignored the approaching train" and comments "appellant never satisfactorily explained" this (A.B., 31). The explanation should be obvious. Deceased used and was presumed to have used due care. Still he had no warning by the faulty wigwag signal of the mile-a-minute approach of appellee's train running late. Deceased was a man in the full possession and control of his faculties who by occupation enjoyed some standing in the rural community of Anderson as a person of above average intelligence and income (R. 161-167, 176-184). Thus, the question as put by appellee answers itself. Appellee's negligence explains Shanahan's lack of knowledge of the approaching train and, but for the prejudicial errors committed during the trial, appellant unquestionably would have had a verdict.

II.

PREJUDICIAL ERROR IN THE EXCLUSION OF TESTIMONY.

As it is clear in the record (R. 272-294), it is now also clear from appellee's brief that Mr. Rowe, who was not an eyewitness to the accident but merely appeared as appellee's wigwag crossing signal maintenance man, was produced on behalf of appellee to establish one point, if possible, namely, that the wigwag operated so perfectly both before and after the accident that appellee didn't know, and had no reason to believe, that it couldn't be relied on (A.B., 51-65). Two attempts of appellant to show otherwise were blocked by appellee's objections as we shall show.

Prejudicial error in striking the proffered rebuttal testimony of Mr. Tolson, who was present at the time of the accident and failed to hear the warning bell of the wigwag as did both Mr. Hewes and Mr. DeRosa, that *"within 30 days of the accident"* he observed Mr. Rowe testing the signal and "it would hold in that position where it wasn't centered—and would stick on one side or the other and wouldn't come back" (R. 512-513) has been thoroughly covered in appellant's opening brief (A.O.B., 38-54). Appellee's artful strategy must be noted in passing however. Appellee constantly misrepresents in its brief that Mr. Tolson's observations were made "some 30 days before the accident" and asserts that only those observations which were made during the period covered by the direct testimony of Mr. Rowe between December 14th and 27th, are pertinent

rebuttal (A.B., 60-64). The record shows that Mr. Tolson's observations were made "within 30 days of the accident", including the December 14-27 period. Because of appellee's objections, appellant was not permitted to show just when they were made "within 30 days of the accident" (R. 513). Clearly, Mr. Tolson's rebuttal testimony was manifestly pertinent and it was reversible error to strike it since it would have shown that appellee knew "within 30 days of the accident" that the wigwag could not be relied on, Mr. Rowe's testimony to the contrary notwithstanding.

By ignoring appellant's evidence, appellee mistakenly asserts "there is not a scintilla of evidence —that the wigwag signal was not operating—there was a complete failure of proof" and consequently, Mr. Tolson's "proffered testimony was wholly immaterial" (A.B., 53). In this connection, appellant's Mr. Hewes, who was one of only two persons looking squarely at the signal from a short distance away behind decedent and through the dark mist towards the lights on the street beyond, testified that he didn't hear the signal's warning bell and "never seen anything except the lights across the street" (R. 64); that the wigwag signal "wasn't working. If it had been working, I could have seen it from the position I was" (R. 81). "If it was working, it should have had the red light on it, shouldn't it?—It was not working" (R. 83).

Appellant's Mr. DeRosa, who viewed the signal from behind decedent at the same time Mr. Hewes

did, also heard and saw no warning (R. 123) and he "did not see the wigwag working" (R. 158). Thus the record clearly shows that Mr. Tolson's proffered rebuttal testimony was neither remote nor collateral but vitally material because, in addition, the great preponderance of the evidence was that the signal was not operating.

Appellee again mistakenly asserts that "no effort was made by appellant to contradict" the evidence "that the signal operated properly subsequent to the claimed signal failure for the fourteen days preceding the accident" (A.B. 59-60). In good conscience, appellee can't complain of that now. In addition to Mr. Tolson's proffered testimony which was stricken, the following took place on cross-examination of Mr. Rowe (R. 294-296):

> "Q. You have put in evidence here, or your counsel has, these records to show that from the 27th through to the 31st of December, 1948, you made shunt tests every day with the same results, that everything was O.K., isn't that right?
>
> A. Yes, sir.
>
> Q. *Don't you know two days after the accident the signal was not operating* until a locomotive southbound approached right there at the Howard Street crossing?
>
> Mr. Phelps. Objected to, irrelevant, immaterial, what was done on other occasions.
>
> Mr. Murman. Well, they have put it in evidence here.
>
> The Court. That is asking something after the accident?
>
> Mr. Phelps. After the accident.

Mr. Murman. They have put it in the record to show it was in good operating order. This goes to the evidence which they have submitted.

Mr. Phelps. If your Honor will recall my offer in this regard—if there was any question about it, I would like to have the record correctly reflect it—it was submitted, testimony, from the 13th to and including the date of the accident, the 27th, and it happens that the remaining inspections appear on the same day, but it wasn't offered to show any inspection after that.

Mr. Murman. I misunderstood the offer, then. I thought it was to show a continuous proper operation.

The Court. I consider something that happened three or four days later entirely irrelevant and immaterial.

Mr. Murman. Yes, as long as that is clear, I will not press it. I have no further questions of this witness." (Emphasis ours.)

The foregoing should make it clear that appellee did not contend that the signal worked properly after the day of the accident despite appellee's records before the jury which extended to December 31, 1948. Had any point been made to the contrary, proper rebuttal testimony was available to show that *two days* after the accident the signal failed to operate. In this connection appellee suggests that Mr. Rowe would have proved appellant's case on this point if he had been properly cross-examined (A.B. 60). However, the foregoing quotation shows that appellant would have not found it easy to prove faulty signal operation by attempting to cross-ex-

amine Mr. Rowe, an adversely interested witness who was fully protected by able counsel.

Appellee asserts that to permit Mr. Tolson's rebuttal testimony "would have been grossly unfair and unjust to witness Rowe", since "Rowe would have had no opportunity either to dispute it or to explain it" (A.B. 63). Since there is no showing that Mr. Rowe could not have been produced on sur-rebuttal had Mr. Tolson been permitted to testify, is appellee suggesting that to have produced Mr. Rowe on sur-rebuttal would have been unfair and unjust to him because, perhaps, an explanation by him could not have been made?

III.

PREJUDICIAL ERROR IN INSTRUCTIONS DIRECTING THE JURY TO FIND FOR APPELLEE.

As to this point, appellee asserts that the case should have been dismissed or a verdict directed for appellee because appellant failed in her proof and in addition decedent was guilty of contributory negligence as a matter of law. Appellee also asserts that on the record the jury had to find for appellee. These assertions are made despite the trial Court's rulings to the contrary and to the effect that a jury question was presented (R. 198, 518-519).

Ignoring this, appellee nevertheless argues that error, if any, in the instructions was immaterial and thus not prejudicial. But not being as confident as

these assertions would pretend, appellee really relies on Rule 51, Rules of Civil Procedure, to attempt to bar a consideration of appellant's contention that there was prejudicial error in sixteen instructions directing the jury to find for appellee (A.B., 65-69) with not one directing the jury otherwise.

Although appellant has covered all these points hereinabove and in appellant's opening brief (A.O.B., 54-58), replying now to fact issues since raised by appellee serves to further emphasize the soundness of appellant's position. Clearly, appellant proved her case and there is no showing of contributory negligence on behalf of decedent.

Taking the points relied on by appellant along with the applicable law, there is no basis for appellee's charge that appellant has studiously avoided consideration of facts to her disadvantage (A.B., 1). All pertinent facts have been considered (A.O.B., 2-8).

Thus, the diagram reproduced in appellee's brief (A.B., 4) should in all fairness be considered along with a similar map received in evidence as appellant's Exhibit No. 11 (R. 197). The photographs reproduced in appellee's brief (A.B., 6) in all fairness should be considered along with similar photographs received in evidence as appellant's Exhibits 3-6 (R. 48). Appellee in all fairness should admit that none of the diagrams, maps and photographs are evidence of the facts, since they fail to show how visibility was lacking due to the dark mist on that stormy

morning of the accident (R. 31, 36, 57, 72, 98, 112, 148, 172).

Although appellee admits decedent stopped, looked and listened, appellee tries to make some point of him stopping short of the stop sign (A.B., 6). Appellee asserts "that the only stop made by Shanahan was at a remote place and not at the stop sign as he was required by law to do (A.B., 28). No authority is cited for this proposition. In all fairness, appellee should admit that decedent's duty was only to stop "upon approaching" the railroad crossing and "before entering" the grade crossing (Section 577(b), California Motor Vehicle Code). While the record shows that decedent carefully obeyed the law, by doing so his view of the oncoming mile-a-minute train of which he had no warning was not only impaired by the dark mist of the stormy morning, but also by appellee's station as well as he proceeded slowly forward (Plaintiff's Exhibits 3-6, 11; R. 60-62, 70-71, 78-79, 101, 103, 116-119, 131-137, 158).

Appellee asserts "the accident was witnessed by three other persons" besides Messrs. Hewes and DeRosa who testified for appellant (A.B., 7). Appellee contends that one of these "three other persons" is Mrs. Lela Johnson, characterized by appellee as one of "two independent witnesses, residents of the community of Anderson" (A.B., 19). The other witness is not named in appellee's brief.

First, as to Mrs. Johnson, it is noted that this colored lady is in fact not an independent witness.

Her husband is a disability pensioner of appellee and she, herself, had been employed by appellee (R. 474). Second, Mrs. Johnson had an oblique view of the accident at best some five hundred feet removed from the wigwag signal (R. 497-498). Third, her vision was obstructed by intervening buildings and trees (R. 484-486). Fourth, her attention was fastened on the speeding engine and not on the wigwag signal (R. 487). Considering all the physical facts and the limitations of one's normal faculties, it is extremely doubtful that Mrs. Johnson saw the accident or the wigwag at any time or with any clarity. Obviously, her obstructed oblique view of the scene of the accident through the misty darkness of that stormy morning, some five hundred feet away, doesn't compare with the clear view of Messrs. Hewes and DeRosa who had an unobstructed ringside seat there at the scene removed only about seventy-five feet across the tracks from the wig-wag signal itself. It must be presumed that decedent, who was closer by a few feet ahead of Messrs. Hewes and DeRosa, looked and saw no warning signal as did Messrs. Hewes and DeRosa, and, like them, received no warnings of the impending collision until an instant before when he was already trapped.

A second witness of those "three other persons" is appellee's freight train conductor, Mr. Griffiths. When the accident occurred, Mr. Griffiths was at "G-3" or near the rear platform of his caboose as shown on appellee's diagram (Defendant's Exhibit D, R. 414). This spot was more than two hundred

feet north from the scene of the accident and thrice the distance from the wigwag signal than were Messrs. Hewes and DeRosa who located themselves at "R.H. 3" and "D. 7", respectively, on appellant's map (Plaintiff's Exhibit 11, R. 64, 123). Like Mrs. Johnson, the record shows that Mr. Griffiths also was fascinated by the speeding train and didn't take his eyes off the racing engine (R. 416). In addition, while Messrs. Hewes and DeRosa were looking squarely at the wigwag from behind the decedent and saw that it wasn't working, Mr. Griffiths was north of the crossing at right angles to decedent looking at best at the wigwag's hairline profile which would have been hard enough to see in clear daylight, not to mention the misty darkness (R. 409-410):

"Mr. Phelps. I think he doesn't understand what profile is. I don't know.

Q. (by Mr. Murman). Do you know what a profile is?

A. No.

Q. I am sorry. Look at me. This is my profile.

A. Yes.

Q. Now, you are looking full at me.

A. Yes, sir.

Q. Here is a full view of the wig-wag?

A. Yes, sir.

Q. *There is a profile view of it, looking at it from the south?*

A. *Yes, sir.*.

Q. *Is that what you saw when you looked at it from the north?*

A. *Yes, sir.*" (Emphasis ours.)

It is doubtful if Mr. Griffiths saw the wigwag at all. He was looking away from it when he saw the fire flying as the engine struck decedent's automobile (R. 420). Obviously, his narrow right angle view of the wigwag signal profile from two hundred feet away in the misty darkness doesn't compare with the clear full view that Messrs. Hewes and DeRosa had of the same signal squarely in front of it about seventy-five feet away. After all, the best way to tell if the signal was operating there in the misty darkness was to look squarely at it and note that the red light was not burning as it should have been (R. 64).

The third of the "three other persons" was appellee's fireman, Mr. Kafer, who only saw decedent's automobile for a fleeting instant as it emerged from behind the station when he hardly had time to holler to the engineer to stop. Mr. Kafer was in the cab on the left side at "K-1" on appellee's diagram, or less than two hundred feet north of the crossing and with the engine out in front traveling at a rate of between sixty-five and seventy miles per hour (Defendant's Exhibit D, R. 361, 367-368). At that speed, the train was going in excess of one hundred feet per second.

Since the wigwag was on the right side of the cab, Mr. Kafer couldn't observe it. Oddly enough, appellee's engineer, Mr. Stainbeck, who was on the right side of the cab where he could see the wigwag operating, didn't see the wigwag though it was his duty to do so (R. 328, 345).

Although the foregoing emphasizes the manifest injustice in repeatedly instructing the jury to find for appellee, appellee urges that "appellant points to no particular instruction to make claim that it is not proper and correct" (A.B., 67-68). Appellee must have ignored the Specification of Errors which furnishes appellee a complete answer (A.O.B., 9-11, 16-17).

The fact issues were for the jury. But how, in all fairness and justice, could the jury determine them properly guided by prejudicial errors, including the sixteen instructions clearly directing the jury over and over again to find for appellee in language "without ambiguity or possibility of misunderstanding". Rule 51 was never intended to unring the constant sour notes of this bell.

CONCLUSION.

The record shows that if the Court had permitted appellant to have been aided by the statutory presumption of ordinary care and lawful conduct, she would have proved conclusively that her deceased husband carefully started in a lawful manner to cross appellee's tracks and was killed in the process of doing so because of the railroad's negligence in the maintenance of its faulty wigwag crossing signal and the operation of its passenger train speeding silently towards the fatal accident. Prejudicial error was committed (1) when the Court's instructions removed the presumption of ordinary care from the

case, (2) when the Court excluded pertinent rebuttal evidence of the faulty wigwag signal, and (3) when the Court repeatedly instructed the jury to find for appellee, which, in fact, the jury did.

In the interest of fairness and justice, the judgment below must be reversed and appellant afforded a new trial.

Dated, San Francisco, California,
December 27, 1950.

Respectfully submitted,
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